

Update: Crime Victim Rights Manual

CHAPTER 8

The Crime Victim at Trial

8.11 Admissible Hearsay Statements by Crime Victims

A. “Present Sense Impressions”

Insert the following language at the end of Section 8.11(A):

See also *People v Bowman*, ___ Mich App ___ (2002), where, in a murder case, the Court of Appeals found no abuse of discretion by the trial court in declining under MRE 803(1) to admit testimony that the victim was “upset” after driving from a meeting with a fellow drug dealer to the home of a friend. Although the Court of Appeals acknowledged that it is “not overly literal” in construing MRE 803(1)’s “immediately thereafter” requirement, and that a statement may qualify under this phrase even when made several minutes after the observed event, the Court found that the statement “was not made merely a few minutes after the conversation . . . but following a drive of an indeterminate length from one house to another, and then in a separate conversation with someone not present during the first conversation.” *Id.* at _____. To conclude that this was a “present sense impression,” the Court stated, would be to “rob the phrase of its meaning” Stating that it “will not interpret the language of this evidentiary rule in a sense so contrary to its ‘fair and natural import,’” the Court found no abuse of discretion by the trial court in declining to admit such an account. *Id.* at _____.

CHAPTER 10

Restitution

10.2 Statutory Authority for Ordering Restitution

Insert the following language at the bottom of p 235:

A restitution order is governed by the statute in effect at the time of sentencing, not at the time of the offense. In *People v Lueth*, ___ Mich App ___ (2002), the Court of Appeals held that the trial court did not err by retrospectively applying an amended version of MCL 780.767(1), which was in effect at the time of sentencing but not at “the time of at least some of the crimes.” The Court concluded that the amended statute, which deleted the requirement that a court consider a defendant’s ability to pay before assessing the amount of restitution, could be applied retrospectively, since it “operate[d] in furtherance of a remedy already existing.” *Id.* at _____. The Court found its holding to be “in accord with previous cases from this Court and our Supreme Court recognizing that a restitution order is governed by the statute in effect at the time of sentencing.” *Id.* Finally, the Court rejected defendant’s argument that the amended restitution statute violated the Ex Post Facto Clause of the Michigan Constitution, Const 1963, art 1, § 10, since the “amended language did not add an obligation to defendant’s burden but instead removed consideration of what may have been used to reduce defendant’s punishment.” *Id.*

CHAPTER 12

The Relationship Between Criminal or Juvenile Proceedings & Civil Actions Filed by Crime Victims

12.6 The Victim's Use of Judgments or Orders From Criminal or Juvenile Proceedings as Evidence in Civil Actions

Insert the following language at the end of Section 12.6:

The Michigan Supreme Court has held that the holding in *Wheelock v Eyl*, 393 Mich 74, 79 (1974), did not survive the adoption of the Rules of Evidence, and thus admission of evidence of a criminal conviction in a subsequent civil suit is governed by the Rules of Evidence, specifically MRE 401-403.

In *Waknin v Chamberlain*, ___ Mich ___ (2002), the plaintiff brought a civil action against defendant for assault and battery. This action was based in part on a series of assaults that allegedly occurred in July 1995, and in part on an assault and battery that allegedly occurred on May 6, 1996. This last alleged assault formed the basis of defendant's previous conviction for assault and battery. In the civil suit, defendant moved to exclude evidence of this conviction. The trial court, relying on the holding in *Wheelock, supra*, which provides that "a criminal conviction after trial, or plea, or payment of a fine is not admissible as substantive evidence of conduct at issue in a civil case arising out of the same occurrence," granted defendant's motion to exclude the evidence of his prior conviction. After the jury returned a verdict of no cause of action, the trial court denied plaintiff's motion for a new trial, concluding that evidence of the conviction was inadmissible not only under *Wheelock* but also under MRE 403 since the admission of such a conviction would have been more prejudicial than probative. The Court of Appeals, relying on MRE 403, affirmed.

The Supreme Court began by noting that *Wheelock* was decided before the adoption of the Michigan Rules of Evidence. The Supreme Court concluded "that the rule in *Wheelock*, at least as it pertains to the use of a conviction in a subsequent civil case, did not survive their adoption." *Id.* at ___. After reviewing the applicable rules of evidence regarding relevancy, probative value, and prejudicial effect, the Court found that defendant's conviction was relevant under MRE 401 since "the fact that defendant had been convicted of assault and battery for the same conduct that plaintiff is now seeking civil damages for certainly 'would have a tendency to make the existence of any fact that is of consequence . . . more probable or less probable than it would be without the evidence.'" *Id.* at ___. Further, the Supreme Court found that the

probative value of the conviction under MRE 403 was not substantially outweighed by the danger of unfair prejudice. In doing so, the Supreme Court, with an emphasis on MRE 403's requirement of "*unfair* prejudice," held as follows:

"Although we agree with the lower courts that the admission of defendant's conviction would be prejudicial, we do not agree that this prejudicial effect would be *unfair*.

"Defendant's conviction is not merely marginally probative evidence, and thus there is no danger that marginally probative evidence will be given undue weight by the jury. Rather, that defendant was found guilty beyond a reasonable doubt—a standard of proof granting him protection greater than the preponderance of the evidence standard in the civil case—is highly probative evidence. Where a civil case arises from the same incident that resulted in a criminal conviction, the admission of evidence of the criminal conviction during the civil case is prejudicial for precisely the same reason it is probative. That fact does not, without more, render admission of evidence of a criminal conviction *unfair*, i.e., substantially more prejudicial than probative. Defendant had an opportunity and an incentive to defend himself in the criminal proceeding. For these reasons, we conclude that the trial court abused its discretion in precluding evidence of defendant's conviction on the basis that its probative value was substantially outweighed by the danger of unfair prejudice." *Id.* at _____. [Emphasis in original.]

Regarding the issue of whether no contest pleas should be treated similarly, the Court stated: "We express no opinion regarding whether pleas of nolo contendere are admissible as substantive evidence in subsequent civil proceedings." *Id.*